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IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

CASPAR W. WEINBERGER, Secretary of Defense, *et al.*,
Petitioners,

v.

CATHOLIC ACTION OF HAWAII/
PEACE EDUCATION PROJECT, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Amicus Curiae Brief of Natural Resources Defense Council, Inc., Sierra Club, Environmental Action Foundation, And Friends of the Earth In Support of Respondents

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INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, the Natural Resources Defense Council, Inc. (NRDC), the Sierra Club, the Environmental Action Foundation, and Friends of the Earth respectfully submit this amicus curiae brief in support of Respondents. Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been filed with the Clerk of this Court.

NRDC is a national, non-profit public interest legal and scientific organization dedicated to the wise management of natural resources and the achievement of environmental quality. NRDC acts to protect the interests of its approximately

31,000 contributing members in the United States and abroad. Among NRDC's membership are 207 members residing in the state of Hawaii, whose health and environment may be directly affected by the possible storage of nuclear weapons at West Loch.

The Sierra Club is a national, non-profit conservation organization of more than 200,000 members, of whom approximately 1,147 are members of the Hawaii chapter. The Sierra Club was organized to study, protect, enhance, and enjoy natural resources and promote a safe and healthy environment. The Sierra Club is concerned that the failure to prepare an environmental impact statement on the potential storage of nuclear weapons at the West Loch facility could result in substantial impacts to the environment and to the health and safety of members of the Sierra Club, particularly its Hawaii chapter.

The Environmental Action Foundation is a national, non-profit environmental organization that was founded by the organizers of Earth Day in 1970 to act as a national information clearinghouse on various environmental issues. The Environmental Action Foundation wishes to ensure that the citizens using its information services, particularly those residing in Hawaii, have access to as much information as possible concerning the environmental impacts of the West Loch facility.

Friends of the Earth (F.O.E.) is a non-profit public interest organization committed to the preservation, restoration and rational use of the ecosphere. F.O.E. has approximately 23,000 members in the U.S., offices in 12 U.S. cities, and sister Friends of the Earth groups in 23 countries worldwide. Approximately 171 members are residents of the state of Hawaii. F.O.E. has since its founding been concerned about the hazards of nuclear technologies, and has worked extensively on nuclear power, nuclear proliferation, and related issues.

SUMMARY OF ARGUMENT

This action raises the question whether the Department of the Navy must prepare an environmental impact statement (EIS) for an 1,800-acre weapons storage facility near Pearl

Harbor on the island of Oahu, Hawaii. The "West Loch" storage facility is sited approximately one mile from the landing flight path of Honolulu International Airport, located near an expanding population center, and has been specially constructed to be capable of storing nuclear weapons. The Ninth Circuit Court of Appeals held that, under the National Environmental Policy Act, 42 U.S.C. (& Supp. III) § 4321 *et seq.* (NEPA) the Navy must prepare an environmental impact statement for the storage facility. In finding that an EIS is required, the Court of Appeals was not engaging in any novel or creative interpretation of NEPA. The Court merely recognized that, if the Navy publicly discloses its proposal to build and operate a facility capable of storing nuclear weapons, it must be considering the possibility at some point in the future of using the facility in such a manner. Nuclear weapons storage then becomes one of the "reasonable alteratives" (or as the Court of Appeals labelled them, "hypotheticals"), which NEPA requires to be discussed in an EIS.

Apart from whether the Navy must prepare an EIS on West Loch is the issue of whether and to what extent the EIS once completed must be disclosed to the public. Contrary to Petitioners' assertions, NEPA does not require the Navy to disclose to the public any information in an EIS on West Loch which is required by statute or executive order to be withheld. The Navy does have an obligation under NEPA to inform the public to the fullest extent possible about the possible environmental hazards associated with its activities, consistent with the need to protect national security information.

The Navy must make available to the public all reasonably segregable unclassified portions of the EIS. Compliance with NEPA's disclosure requirement cannot be evaded simply on the basis of a prior unsubstantiated judgment that the unclassified parts of the EIS would be too general or abstract to be of value to the public.

A substantial amount of data concerning the storage of nuclear weapons is already unclassified and in the public record, as evidenced in part by the Navy's publication of a generic EIS on nuclear weapons storage. Sufficient unclassified

information exists to permit the Navy to prepare, and make publicly available, a comprehensible and useful EIS on West Loch discussing the four critically important environmental factors which the Court of Appeals ruled must be addressed.

ARGUMENT

I. THE NAVY VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT BY FAILING TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT FOR THE WEST LOCH WEAPONS STORAGE FACILITY

The crucial question before this Court is whether the Department of the Navy violated the National Environmental Policy Act (42 U.S.C. (& Supp. III) § 4321 *et seq.*) (NEPA) by failing to prepare an environmental impact statement (EIS) regarding the construction and use of the "nuclear-capable" West Loch weapons storage facility.

The passage of NEPA resulted from Congressional concern about the serious deterioration of environmental quality and desire to make protection of the environment the mandate of every federal agency.[1] While NEPA sets out a number of substantive goals for environmental protection,[2] its requirements, as recognized by this Court, are "essentially procedural."[3] At the heart of NEPA lies Section 102(2)(C), which this Court has described as:

> one of the "action-forcing" provisions intended as a directive to "all agencies to assure consideration of the environmental impact of their actions in decision-making."[4]

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[1] *See* S. Rep. No. 91-296, 91st Cong., 1st Sess. 5 (1969).

[2] These goals include the attainment of "the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." 42 U.S.C. § 4331.

[3] *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980).

[4] *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976) (*citing* Conference Report on NEPA, 115 Cong. Rec. 40416 (Dec. 20, 1969) (Senate)).

Section 102(2)(C) specifies, in pertinent part, that:

> [A]ll agencies of the Federal Government shall—
>
> * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) The environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action. . . .[5]

This Court has described the obligation of federal agencies to prepare EISs pursuant to the requirements of Section 102(2)(C) as follows:

> [T]he statute clearly states when an impact statement is required, and mentions nothing about a balancing of factors . . . . The procedural duty imposed upon agencies by this section is quite precise, and the role of the courts in enforcing that duty is similarly precise.[6]

A. The West Loch Facility is a Major Federal Action Significantly Affecting the Quality of the Human Environment and Therefore Requires an Environmental Impact Statement

Petitioners admit that NEPA applies to the Navy and to its weapons storage activities.[7] The first question this Court must decide is whether the Court of Appeals and District Court below were correct in their holdings that the West Loch project is a "major Federal action significantly affecting the quality of

[5] 42 U.S.C. § 4332(2)(C).

[6] *Kleppe v. Sierra Club, supra* n. 4, at 405-06.

[7] Brief for Petitioners, at 12.

the human environment."[8] The regulations of the Department of the Navy provide criteria to be used in deciding whether a proposed action falls within this category.[9] They include the "potential for threat or hazard to the public," and the "potential for significant degradation of environmental quality."[10]

The West Loch storage facility consists of 48 weapons storage magazines and associated security facilities encompassing some 1,800 acres and costing over eight million dollars to construct.[11] Petitioners admit that the West Loch facility was specifically designed and constructed in order to be capable of storing nuclear weapons.[12] The District Court found that the West Loch storage facility is within the traffic area of Honolulu International Airport and approximately one mile from the landing flight path for flights from the continental United States and elsewhere.[13] Two other military airports are also located within five miles of West Loch.[14] The District Court found that the Federal Aviation Administration has not established a prohibited flight zone over the West Loch area.[15] The West Loch facility is located in the Pearl Harbor area of Oahu, which is within ten miles of downtown Honolulu, and is the area experiencing the most rapid population growth on the island.[16] If an airplane crashed into a magazine storing nuclear weapons at West Loch, the result might be a nuclear explosion and radioactive fallout seriously damaging the health of thousands of people living nearby, as well as the environment.[17]

In accordance with its regulations implementing NEPA,[18] the Navy prepared a brief, classified Environmental Impact Assessment (EIA) in order to determine whether or not an EIS

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[8] Petition for a Writ of Certiorari [hereinafter cited as "Petition for Cert."], at 3a, 14a.

[9] 46 Fed. Reg. 22,892 (Apr. 22, 1981).

[10] Id. at p. 22,894 (to be codified at 32 C.F.R. § 775.6).

[11] Petition for Cert, at 12a, 18a.

[12] Joint Appendix, at 18.

[13] Petition for Cert., at 13a.

[14] Joint Appendix, at 62.

[15] Petition for Cert., at 13a.

[16] Joint Appendix, at 55, 74-75.

[17] Joint Appendix, at 54-57.

[18] 46 Fed. Reg. 22,892, 22,894 (Apr. 22, 1981).

on the West Loch facility would be required. Every EIA must consider all reasonably foreseeable consequences of the proposed action, as well as all reasonable alternatives and their potential impacts.[19] The unclassified portion of the EIA on West Loch discusses the environmental impacts of the construction of the facility and its use for the storage of non-nuclear weapons. The EIA, however, omits any reference to the unclassified fact that the facility was made capable of storing nuclear weapons. This fact alone makes it obvious that the Navy is considering such storage as a reasonable alternative future use of the facility. Had the Navy evaluated this alternative, it would have reached the same conclusion as the Courts below that the West Loch project is "a major Federal action significantly affecting the quality of the human environment."

This conclusion is buttressed by the subsequent preparation by the Navy of a generic Candidate Environmental Impact Statement (CEIS) on nuclear weapons storage. However, the CEIS, which discusses to a limited extent some of the impacts of nuclear weapons storage, is inadequate for purposes of the West Loch facility. The CEIS does not discuss the potential harm resulting from airplane crashes into the nuclear weapons storage magazines nor the environmental impacts specific to West Loch.[20] These omissions evidence a lack of full compliance with NEPA regarding the West Loch facility, and prompted the Court of Appeals to hold that:

> [The district court] erred in holding that the Navy has complied with NEPA to the fullest extent possible. We conclude that the EIA and the CEIS provided by the Navy are inadequate and that an EIS is required under the provisions of NEPA.[21]

Sensitive to the Navy's policy of neither confirming nor denying the presence of nuclear weapons at any particular site, the Court of Appeals ordered the Navy to prepare a

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[19] 40 C.F.R. § 1508.9 (NEPA regulations of the Council on Environmental Quality).

[20] Petition for Cert., at 27a-35a.

[21] *Id.* at 7a.

"hypothetical" EIS on West Loch. At first glance, this may appear to be a novel or creative interpretation of NEPA. In fact, all EISs are "hypothetical" since they involve a proposed action and reasonable alternatives thereto which may or may not be taken at some point in the future.

B. The Navy Is Not Relieved From Its Obligation To Prepare an Environmental Impact Statement on the West Loch Facility Because of the Nature of Nuclear Weapons Storage

Petitioners apparently argue that the Navy need not even prepare an EIS because most of the information contained in the statement could not be publicly disclosed, including whether or not nuclear weapons are actually being stored at West Loch. The obligation to prepare an EIS, however, is completely independent from any requirement for its release to the public. Assuming *arguendo* that the Navy could not disclose a single word of the EIS, it is not discharged from its obligation to prepare the statement. There is no "national defense" exemption to NEPA,[22] and the Navy's own regulations state that:

> The fact that a proposed action is of a classified nature does not relieve the proponent of the action from complying with the NEPA.[23]

The need for an EIS, even one that is totally classified, exists because a major purpose of NEPA is to ensure that agency decisionmakers consider the environmental consequences of their proposed actions and that their decisions are "fully informed and well-considered."[24] The regulations of the Council on Environmental Quality, implementing the procedural provisions of NEPA, state that:

> An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant materials to plan actions and make decisions.[25]

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[22] *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 823 (D.C.Cir. 1977).

[23] 46 Fed. Reg. 22,892, 22,894 (Apr. 22, 1981).

[24] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).

[25] 40 C.F.R. § 1502.1.

Petitioners also claim that if the Navy is required to prepare an EIS on West Loch, it would be obligated to prepare an EIS for every nuclear weapons storage facility, which would unlawfully confirm the presence of nuclear weapons at these sites.[26] In order to avoid this result, the Navy would be forced at great administrative cost to prepare EISs on every facility capable or perceived to be capable of storing nuclear weapons.[27] Yet neither compliance with NEPA nor the need to protect military secrets compels the Navy to adopt this course of action. The need for an EIS on West Loch is triggered by the proposal for large-scale construction of new nuclear-capable weapons storage magazines at the site.

The Navy need not prepare an EIS for other existing nuclear weapons-capable storage sites unless there is a proposal to modify them in a manner constituting "a major Federal action significantly affecting the quality of the human environment."[28] The Navy's failure to prepare EISs for these facilities, or to admit having done so, reveals only that no major modifications are planned. It does not reveal whether or not nuclear weapons are or may be stored at any particular site.

The Navy itself admits that little or no modification of existing facilities is now planned. The CEIS states:

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[26] *See* Brief for Petitioners, at 17.

[27] Brief for Petitioners, at 24. It should be noted that the Departments of Defense and Energy have prepared numerous EISs on nuclear weapons activities and facilities, such as the Rocky Flats Plant, which manufactures the plutonium components of U.S. nuclear weapons (FEIS, No. DOE/EIS-0064 (Apr. 1980)) and the Nevada Test Site for nuclear weapons (FEIS, No. ERDA-155)(Sept. 1977)). Although these actions are much more critical to our national defense than storage depots, the government has never argued that they are exempted from NEPA simply because EISs on these facilities could provide a "road map" of our defense system.

[28] NEPA does not apply to any Federal actions completed prior to the Act's passage. *See Sworob v. Harris*, 451 F. Supp. 96, 103 (E.D.Pa. 1978), *aff'd without opinion*, 578 F.2d 1376 (3d Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979). For many actions completed subsequent to that time, the Navy is protected from the impact statement requirement by the doctrine of laches. *See, e.g., Environmental Defense Fund v. Alexander*, 614 F.2d 474 (5th Cir. 1980).

> As it is expected that storage sites noted will remain essentially as presently configured, there are no proposed "actions" that affect either the objectives [or] specific terms of approved or proposed federal, state or local land use plans, policies or controls.

Petition for Cert., at 30a. It is very questionable whether the preparation of an EIS on West Loch would force the preparation of even a single additional impact statement. In any event, the fact that the preparation of EISs would be burdensome or costly has never been held to excuse an agency from NEPA compliance. *See, e.g., Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission,* 449 F.2d 1109, 1115 (D.C.Cir. 1971).

Even though the Navy cannot confirm whether it has decided to store nuclear weapons at West Loch, an EIS, even a totally classified one, is required and would be of great benefit to the Navy at this early stage in determining how to avoid or mitigate the hazards of such storage should the need arise.[29] Without an EIS, the Navy would not be forced to give careful and full consideration to these matters. In the pursuit of national security objectives, the Federal Government must not be allowed to ignore the potential for serious and undue harm to the American public resulting from military activities within the borders of the United States.

Petitioners are requesting this Court to rule that the Navy need not prepare an EIS because it would be impossible for the Navy to reveal any information which an EIS on West Loch would contain. The Court, however, should not be asked to rule on the theoretical impossibility of disclosure until an actual impact statement has been prepared, and a controversy has arisen over the question of disclosure. The Court cannot decide

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[29] As stated in *Calvert Cliffs' Coordinating Committee, supra:*

> Compliance to the "fullest" possible extent would seem to demand that environmental issues be considered at every important stage in the decision making process concerning a particular action — at every stage where . . . alterations might be made in the proposed action to minimize environmental costs.

449 F.2d at 1118.

these questions of law outside the context of specific factual situations.[30] Irrespective of the question of public disclosure, the Navy has an obligation to prepare an EIS. The Court should therefore require the Navy to prepare an EIS and, as discussed below, to comply with NEPA's disclosure requirements "to the fullest extent possible."

II. NEPA DOES NOT REQUIRE THE NAVY TO DISCLOSE ANY INFORMATION IN AN EIS ON THE WEST LOCH WEAPONS STORAGE FACILITY WHICH IS REQUIRED BY STATUTE OR EXECUTIVE ORDER TO BE WITHHELD. THE NAVY MUST MAKE AVAILABLE TO THE PUBLIC ALL REASONABLY SEGREGABLE UNCLASSIFIED PORTIONS OF THE EIS

Petitioners attempt to portray the case before this Court as involving an "irreconcilable conflict" between NEPA's requirement that an EIS be disclosed to the public and the Navy's statutory obligations to protect classified information. In fact, NEPA, the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, the Atomic Energy Act of 1946, as amended, 42 U.S.C. (& Supp. III) § 2011 *et seq.*, and Executive Order No. 12065 on "National Security Information," 3 C.F.R. at 190, contain interlocking disclosure requirements, which reflect a common policy in favor of public disclosure to the fullest extent possible consistent with the protection of national security. These legal requirements dovetail to oblige the Navy to make available to the public all reasonably segregable unclassified portions of the required EIS.

Contrary to the assertions of Petitioners, the preparation of an EIS on West Loch pursuant to NEPA would not force the Navy to reveal information which otherwise may not be disclosed. Section 102(2)(C) of NEPA states that:

> Copies of such [environmental impact] statements . . . shall be made available to the President, the Council on Environmental Quality and to the

[30] *See, e.g., Rizzo v. Goode*, 423 U.S. 362 (1976).

> public as provided by section 552 of Title 5 [the Freedom of Information Act] . . . .[31]

The Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, explicitly does not require the release of any information specifically exempted from disclosure by statute or authorized to be kept secret by Executive Order in the interest of national defense or foreign policy. The Navy thus would not be required by NEPA to disclose in an EIS on nuclear weapons storage at West Loch information which is "Restricted Data" under the Atomic Energy Act[32] or properly classified under Executive Order No. 12065, "National Security Information."[33]

The Navy must make every reasonable effort in preparing an EIS to segregate classified information from unclassified information in order to disclose the unclassified portions to the public. The Navy's regulations implementing NEPA state that:

> [T]he EIS . . . shall be prepared, safeguarded and disseminated in accordance with the requirements applicable to classified information. When feasible, these documents *shall* be organized in such a manner that classified portions are included as annexes so that the unclassified portions can be made available to the public.[34]

The Freedom of Information Act, which governs the disclosure of EISs, similarly requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."[35]

This obligation exists even if the Navy believes that the unclassified portion of the EIS would be inconclusive, abstract, or even unsettling. It is not within the Navy's discretion to exempt itself from NEPA compliance simply on the basis of a

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[31] 42 U.S.C. § 4332(2)(C).

[32] 42 U.S.C. § 2014, 2161. *See* Section III(A) *infra.*

[33] 3 C.F.R. at 190 (June 28, 1978).

[34] 46 Fed. Reg. 22,892, 22,894 (Apr. 22, 1981)(emphasis added).

[35] 5 U.S.C. § 552(b).

prior unsubstantiated judgment that the release of unclassified information in the EIS would not prove useful to the public.

The desire of the Navy here to foreclose public access to information about activities at West Loch which may present significant dangers to the general public contradicts Defense Department regulations requiring the Navy to "facilitate the flow of unclassified information about DoD operations to the public,"[36] and to make readily available to the public all information not specifically exempt from disclosure, in order to "promote public trust."[37] As the Court of Appeals recognized, an EIS is one vehicle for assuring that governmental agencies are accountable to the electorate for their activities.[38] Although a governmental action may relate to national defense and the disclosure of information in an EIS may engender controversy, these considerations, which are present in the case at hand, do not outweigh the critical importance of public discussion and debate in a democratic society.

III. THE NAVY CAN PREPARE AND PUBLICLY DISSEMINATE PORTIONS OF AN EIS ON WEST LOCH WHICH WOULD BE COMPREHENSIBLE AND USEFUL SINCE MUCH INFORMATION RELEVANT TO NUCLEAR WEAPONS STORAGE IS ALREADY UNCLASSIFIED

Petitioners claim that if the Navy were to prepare an EIS on the West Loch facility, virtually every portion would consist of Restricted Data, classified information, or "inextricably intertwined" unclassified material, and therefore could not be revealed in a meaningful form to the public. Petitioners obscure the critical fact that a substantial amount of information relating to nuclear weapons storage is already in the public record and that the Navy could declassify more such information if it would be in the public interest. The Navy could prepare an EIS on West Loch whose publicly available portion

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[36] 32 C.F.R. § 159.3(a).

[37] Dod Freedom of Information Act Program, 32 C.F.R. Part 286.

[38] Petition for Cert., at 6a-7a. *See also, Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 788 (D.C.Cir.), *application for injunction denied*, 404 U.S. 917 (1971).

would provide a comprehensible and useful discussion of the four critical environmental issues identified by the Court of Appeals.

A. Substantial Information Concerning the Design, Manufacture, or Utilization of Atomic Weapons Is No Longer Prohibited From Disclosure by the Atomic Energy Act

Petitioners incorrectly assert that virtually all of the information in an EIS on nuclear weapons storage at West Loch would involve Restricted Data which is prohibited from disclosure by Section 224 of the Atomic Energy Act of 1946, as amended, 42 U.S.C. § 2164. "Restricted Data" is defined by the Atomic Energy Act as all data concerning the "design, manufacture or utilization of atomic weapons,"[39] but specifically excludes all information subsequently removed from the Restricted Data category. Since passage of the Act, the Departments of Defense and Energy have jointly determined that a substantial amount of Restricted Data could be "published without constituting an unreasonable risk to the common defense and security"[40] or could "be adequately safeguarded as defense information."[41] The Departments therefore transferred this information to the category of "Formerly Restricted Data," and the absolute bar to its disclosure in the Atomic Energy Act no longer applies.[42]

Formerly Restricted Data becomes subject to the same safeguards afforded to other defense information; namely, those in Executive Order No. 12065, "National Security Information," (3 C.F.R. at 190) and the DoD Information Security Program (32 C.F.R. Part 159). These security provisions reflect a strong policy against overclassification and in favor of public release of all information and segments of documents not specifically classified.[43] The Department of Defense has a responsibility and obligation to declassify information when the

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[39] 42 U.S.C. § 2014(y).

[40] 42 U.S.C. § 2162(c).

[41] 42 U.S.C. § 2162(d).

[42] *Id.*

[43] Exec. Order No. 12065, §§ 1-101, 1-504, 1-604, 1-605, 3 C.F.R. at 191-195.

public interest in disclosure outweighs the potential damage to national security. Exec. Order No. 12065, § 3-303, 3 C.F.R. at 197. Much of this Formerly Restricted Data has in fact been declassified altogether.[44]

Petitioners argue that:

> [W]ere an EIS to hypothesize that a particular facility might store nuclear warheads of type A, that hypothesis would reveal that somewhere in our nuclear arsenal there exists weapons of type A.[45]

The Navy fails to admit that information characterizing the types of existing U.S. nuclear weapons is not classified, even if the total number of weapons of a given type in the stockpile or the number at a specified location is classified information. The Fiscal Year 1982 Arms Control Impact Statements prepared by the U.S. Arms Control and Disarmament Agency identify the twenty-four nuclear weapon types in the U.S. stockpile and military systems used to deliver these weapons.[46] For some weapons, such as the B-61 bomb, the physical size of the weapons is unclassified, and, in fact, a number of nuclear weapon models are on display at the Department of Energy Museum in Albuquerque, New Mexico.[47] The types of safety and security features of some warheads are also unclassified.[48]

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[44] See Joint ERDA/DOD Nuclear Weapons Classification Guide, CG-W-4 (Petition for Cert., at 36a-45a).

[45] Brief for Petitioners, at 23.

[46] U.S. Arms Control & Disarmament Agency, *Fiscal Year 1982 Arms Control Impact Statements.* These systems include missile, artillery shell, gravity bomb, or atomic demolition. *See also* Proposed Energy and Water Development Appropriations for 1982: Hearings before the House Subcomm. on Energy and Water Development, 97th Cong., 1st Sess. at 106-10 (March 3, 1981) (statement of Robert L. Morgan).

[47] Letter from Lynnie Grace, U.S. Dept. of Energy, to Dr. Thomas B. Cochran, Natural Resources Defense Council, Inc. (March 30, 1981).

[48] *See, e.g.,* U.S. Arms Control & Disarmament Agency, *Fiscal Year 1981 Arms Control Impact Statements.*

Information on the types of nuclear weapons used by each branch of the armed forces and their modes of deployment is available to the public.[49] For example, the Navy has released a document which lists the types, dimensions, and weights of nuclear weapons which are stored aboard Navy ships.[50]

This unclassified information would enable the public to understand the kinds of nuclear weapons which might be stored at West Loch, and the general nature of their incorporated safety features. This information is not "inextricably intertwined" with Restricted Data or classified information.

The public disclosure by the Navy of its CEIS demonstrates that not all information concerning nuclear weapons storage is Restricted Data or classified defense information. The CEIS discusses the possibility of a nuclear accident and its impacts, the risks of low-level radiation escaping from a storage site, and relevant design and safety considerations.[51] Although, as noted above, the CEIS is not adequate either as a generic impact statement or a site-specific statement of the type required for West Loch, its very existence indicates that publication of portions of an EIS for West Loch is feasible.

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[49] U.S. Dept. of Defense, Report of Secretary of Defense Harold Brown to the Congress on the FY 1982 Budget, FY 1983 Authorization Request, and FYS 1982-1986 Defense Programs, at 109-130 (Jan. 19, 1981)(measures to improve the safety and security of theater nuclear forces); Organization of the Joint Chiefs of Staff, Supplement to *United States Military Posture for FY 1982*, 69-71, 75-79. For example, the B-61 bomb is usable on any U.S. aircraft that can deliver a nuclear bomb. Proposed Energy and Water Development Appropriations for 1980: Hearings before the House Subcomm. on Energy and Water Development, 96th Cong., 1st Sess., at 2655 (March 19, 1979)(statement of General Joseph K. Bratton). Such nuclear-capable aircraft include the A-4, A-6, A-7, F-4, and F-14 (primarily carrier-based) used by the Navy. Supplement to *United States Military Posture for FY 1982, supra*, at 76-77 and 88.

[50] Dept. of the Navy, *Loading and Underway Replenishment of Nuclear Weapons*, NWP 14-1 (Rev. A), at 1-7, 1-8 (1979).

[51] Petition for Cert., at 27a-35a.

B. Considerable Unclassified Information Exists To Enable the Navy To Discuss Publicly in an EIS on West Loch the Environmental Impacts of Storing Nuclear Weapons Without Revealing Classified Information

The Court of Appeals held that the Navy's impact statement should discuss four "critically important" environmental factors as they relate to the West Loch facility: the risk of nuclear accidents, the enhancement of that risk by the physical proximity of the airports, the effects of any nuclear accident upon the surrounding population and environment of Hawaii, and the effects of continual low-level radiation from the storage of the weapons near populated areas. Petition for Cert., at 3a. The Navy can discuss these four factors in considerable detail simply by using information found in unclassified, publicly available documents. This discussion, as the Court of Appeals recognized, would prove immensely valuable in informing nearby residents and other concerned members of the public, and would not reveal any Restricted Data or classified information.

(1) The Risk of Nuclear Accidents

The Navy asserts in the CEIS that the risk of a nuclear accident in a weapons storage facility is zero,[52] and implies in the Brief for the Petitioners that it is not feasible to have a meaningful discussion of the risks.[53] Neither of these assertions is true. The first statement would be true only if the nuclear components (i.e. the fissile uranium and/or plutonium) of all nuclear weapons used, stored, or ferried by the U.S. Navy were physically separated from the high explosive material and inserted into the weapon at the last minute. The Defense Department has stated that "[w]ith some early models of

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[52] The CEIS states:

> [T]he design and structure of nuclear weapons will not permit an accidental nuclear explosion or a nuclear contribution to the explosion of conventional explosives. This statement is applicable to both normal and abnormal situations. Petition for Cert., at 30a-31a.

[53] Brief for Petitioners, at 21-23.

nuclear weapons, it was standard procedure during *most* operations to keep a capsule of nuclear material separate from the weapon for safety purposes."[54] This procedure was abandoned in the late 1950s.[55] More modern designs incorporate safety features which reduce but do not eliminate the possibility of a nuclear explosion. Major General William W. Hoover, Director of Office of Military Applications, Department of Energy recently stated that:

> [G]iven that nuclear weapons exist and can be exposed to severe accident/incident situations, there is a small but non-zero probability that some undesirable consequences could occur, the most unlikely, but most far-reaching situation, should it occur, is a nuclear explosion.[56]

Nuclear weapons accidents in this sense are similar to nuclear reactor accidents. The probability of a catastrophic accident may be very small, but the potential harm would be very serious.[57]

The fact that nuclear weapons can be detonated accidentally is evidenced by the current regulations of the Department of Energy (DOE) for the transportation of nuclear weapons.[58]

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[54] U.S. Dept. of Defense, *Narrative Summaries of Accidents Involving U.S. Nuclear Weapons, 1950-1980,* at ii (Current as of April, 1981) (emphasis added.)

[55] *See* U.S. Depts. of Defense and Energy, "History of Nuclear Weapons Control" in *Long Range Nuclear Weapon Planning Analysis,* Annex 2 to Appendix A, pp. A-2-3 to A-2-7 (July 15, 1980).

[56] Proposed Dept. of Energy Authorization Legislation (National Security Programs) for Fiscal Year 1982: Hearings on H.R. 2969 before the Subcomm. on Procurement and Military Nuclear Systems, 97th Cong., 1st Sess. 217 (March 1981)(statement of Maj. Gen. William W. Hoover).

[57] The accidents at the Brown's Ferry and Three Mile Island nuclear plants have led many to criticize previous government assessments and statements regarding the probability of accidents at nuclear reactor facilities. *See, e.g., Report of the President's Commission on the Accident at Three Mile Island* (1979).

[58] The Department of Energy is responsible for, *inter alia,* the design, development, test, production, and retirement of nuclear weapons and surveillance and certification of the reliability of stockpiled weapons. "History of Nuclear Weapons Control," *supra* note 55, App. A, at A-2-2. *See also Loading and Underway Replenishment of Nuclear Weapons, supra* note 50, at 2-1.

One of the minimum criteria is that "nuclear explosives not known to be one-point safe will not be transported offsite." DOE Order 5610.0, Sept. 11 1979. "One-point safe" explosives are those which have less than one chance in a million of achieving a nuclear yield if the high explosive is accidentally detonated.[59] In addition, the Department of Energy, as well as its predecessor agencies, the Atomic Energy Commission and the Energy Research and Development Administration, has conducted numerous safety tests of nuclear weapons, to determine the size of a nuclear explosion in the event of an accident.[60] Some of these tests had nuclear yields.[61]

There has been at least one accidental detonation of the high explosive components for nuclear weapons at an Atomic Energy Commission storage facility in Medina Base, Texas in 1963.[62] Under the Department of Energy's Stockpile Improvement Program, several nuclear weapons in the existing inventory will be upgraded by incorporating new high explosive materials which are more resistant to detonation in abnormal

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[59] The following definitions are set forth in DOE Order 5610.0 (Sept. 11, 1979):

Nuclear Explosive: Any assembly or subassembly containing fissile and/or radioactive materials and high explosives, propellants, or other means capable of producing a nuclear detonation.

. . . .

One-Point Safe Nuclear Explosive: Those nuclear explosives which in the event of a detonation initiated at any one point in the high explosive system presents no greater probability than 1 in 10^6 of achieving a nuclear detonation.

[60] W. Langham, *et al, Plutonium Dispersal by Accidental or Experimental Low-Order Detonation of Atomic Weapons* 39 (LA-1981 revised ed.) [hereinafter cited as "Los Alamos Report"]. *See also* U.S. Dept. of Energy, "Tests Conducted between September 12, 1958 and October 30, 1958 — Operation Hardtack II," *In Announced United States Nuclear Tests July 1945-December 1980,* NVO-209, Rev-1, 9-10 (Jan. 1981).

[61] Nuclear yields associated with safety experiments during Operation Hardtack II ranged up to 115 tons of TNT equivalent.

[62] U.S. Dept. of Defense, *Narrative Summaries of Accidents Involving U.S. Nuclear Weapons 1950-1980, supra* note 54, at 23.

environments such as fires and airplane crashes, and which would reduce the danger of radioactive releases.[63]

This discussion indicates not only that there exists a risk of a nuclear accident in a storage facility such as West Loch, but that the magnitude of the risk can be discussed in a meaningful manner using information already in the public record.[64]

(2) The Enhancement of the Risk of Nuclear Accidents by the Physical Proximity of the Airports

The location of the West Loch facility near three airports increases the probability of an accidental nuclear explosion because of the increased danger of severe damage to the magazines and fire as a result of an airplane crash. The probability of various levels of radioactive releases associated with airplane crashes into a magazine could be determined by the same mathematical techniques as are routinely employed by the Nuclear Regulatory Commission in assessing nuclear reactor safety.[65]

The EIS on West Loch could, for example, list each type or weight category of aircraft that frequents the airports near West Loch and for each category determine the probability and effects of an airplane crash into a West Loch storage magazine. Similar calculations have been performed by the Nuclear Regulatory Commission in considering the possibility of aircraft

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[63] Proposed Dept. of Energy Authorization Legislation (National Security Programs) for Fiscal Year 1982: Hearings on H.R. 2969 before the Subcomm. on Procurement and Military Nuclear Systems, 97th Cong., 1st Sess. (March 1981). *See also* Statement of Hon. James P. Wade, Jr., Assistant Secretary of Defense (Atomic Energy):

> We must extend our effort to minimize plutonium dispersal hazards. The inclusion of IHE in some weapon systems is a major step toward reducing this hazard. We have asked the DOE to continue investigation of improved safety resulting from [deleted]. We need to address explosive safety for the stockpile as a whole. Additional research in this area is a priority DOD requirement. *Id.*, at 47.

[64] *See generally* Los Alamos Report, *supra* note 60.

[65] *See, e.g.*, U.S. Nuclear Regulatory Commission, "Fault Trees," *Reactor Safety Study* (Appendix II) (1975).

crashes into nuclear power plants located near airports.[66] The presentation of this data in an EIS on West Loch would not necessitate the use of classified material.

(3) The Effects of Any Nuclear Accident Upon the Surrounding Population and Environment of Hawaii

The effects of the accidental release of radioactive materials in the area around West Loch can be described in considerable detail in the unclassified portions of an EIS. Information concerning the types of radioactive materials used in U.S. nuclear weapons is unclassified.[67]

While information concerning the amounts of materials used in nuclear weapons is classified, it is not necessary to specify these amounts in order to discuss the quantity of material which might be released offsite, the ground contamination levels on and offsite, the potential for inhalation of radioactive particles, and the health effects of such inhalation.[68] Nor is it necessary for the Navy to reveal what percentage of the total amount of nuclear materials in weapons stored at West Loch would be released.[69]

Two cases of accidental dispersal of radioactive nuclear weapons materials have been documented. The first involved the crash of a B-52 bomber near Palomares, Spain in 1966, in which the high explosive materials in two of the four nuclear weapons on board exploded on impact with the ground.[70] The second involved the crash and burning of a B-52 bomber at Thule, Greenland in 1968, in which fire destroyed all four nuclear weapons on board.[71] Both cases resulted in widespread radioactive contamination requiring the removal of 1,400 tons of soil and vegetation from Palomares and 237,000 cubic feet of

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[66] *See In re Metropolitan Edison Co.*, 8 N.R.C. 295 (1978).

[67] U.S. Depts. of Defense and Energy, *The Effects of Nuclear Weapons* 12 (3d ed. 1977).

[68] *See, e.g.*, Los Alamos Report, *supra* note 60.

[69] *Id.*

[70] *See Narrative Summaries, supra* note 54, at 29.

[71] *Id.*, at 30. *See* Joint Appendix, at 18.

ice, snow, and water at Thule.[72] The contamination levels and associated decontamination efforts from these two accidents have been extensively discussed in unclassified literature.[73] Ground contamination levels have been reported without revealing the detailed design characteristics of the weapons involved.[74] Similarly, extensive unclassified information on the effects of radioactive fallout from nuclear weapons tests does not reveal classified details of nuclear weapons designs.[75] As evidenced in the record of this case, the Navy could discuss in an unclassified portion of the EIS the health effects associated with the inhalation of plutonium, or arising from exposure to direct radiation and radioactive fallout from a nuclear detonation.[76]

(4) The Effects of Continual Low-Level Radiation from the Storage of the Weapons Near Populated Areas

The Navy has already submitted a Candidate Environmental Impact Statement on nuclear weapons storage which discusses the risks associated with continual low-level radiation from the storage of nuclear weapons near populated areas. In preparing an EIS, the Navy should determine whether it is necessary to supplement the information in the CEIS to address factors specific to West Loch.[77]

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[72] *Id.*, at 29-30. *See* Joint Appendix, at 18.

[73] United Nations Scientific Committee on the Effects of Atomic Radiation, *Ionizing Radiation: Levels and Effects*, Vol. 1.

[74] *Id.*

[75] *See* U.S. Environmental Protection Agency, "Levels and Distribution of Environmental Plutonium Around Trinity Site," ORP/LV-78-3 (Oct. 1978); U.S. Atomic Energy Commission, *Radioactive Fallout from Nuclear Weapons Tests* (1965).

[76] Joint Appendix, at 39-44. This discussion would contain information such as that presented in the Los Alamos Report, *supra* note 60; *The Effects of Nuclear Weapons, supra* note 67; National Academy of Sciences, Committee on Biological Effects of Ionizing Radiation, *The Effects on Population of Exposure to Low Levels of Ionizing Radiation: 1980*, and numerous scientific articles referenced therein.

[77] 40 C.F.R. § 1502.20.

IV. CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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